

REFORMULATING FRAUD CRIMES UNDER ARTICLE 378 OF THE CRIMINAL CODE BASED ON RESTORATIVE JUSTICE VALUES

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Abstract

Crime of frauds are like an iceberg that always appears till the digital era (such First Travel case). In fact, it is a classic crime since (1915-1918) when 'the Nederlandsch-Indie Criminal Code' was enacted. Today, the criminal and penal statutes and their application reflected in Article 378 of the Criminal Code are considered to cause systematic injustice, loss, and suffering, especially for the victims. Then this article needs to be reformulated under the problem formulation "how to reformulate the crime of fraud in Article 378 of the Criminal Code based on restorative justice value?" which is considered more pro-Pancasila values and the victims. As literature research, various legal materials from primary, secondary and tertiary are analyzed descriptively qualitatively. At last, the researcher concludes that a restorative reformulation of crime of fraud in Article 378 of the Criminal Code can be done through a value and policy reorientation by embodying various basic assumptions and the concept of restorative justice in the new article formulation, either by enacting it as a 'klachtdelict', especially in the Criminal Code; or embodying restorative sanctions, such as compensation in the penal formulation of the Article. Because it recognizes the harms and needs of the offender and the victims, unity in their relationship, deliberations - dialogue in their process, and forgiveness - peacemaking in their decisions as part of restorative justice values of Indonesians based on Pancasila.

Key Words: Reformulation, Fraud, Policy, Restorative Justice.

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A. Introduction

When trying to reform the Criminal Code in the political context, Mahfud MD explained that there must be at least two considerations: law enforcement in the field; and the suitability of the formulation of the new article with state policies in achieving state goals.² It can be seen from its evaluative study, how fraud under Article 378 of the Criminal Code is applied to fraud cases, and on how to formulate Article 378 to be better in the future based on the values of the restorative justice concept which has been developing in the last five decades.³

Fraud, a classical crime in the digital era, is like an iceberg and seem to be an inevitability that has appeared throughout human history. A fraud case revealed a few years ago that caught the public attention, was ‘the First Travel pilgrimage bureau fraud case’ which resulted in losses of almost IDR 1 trillion (905 billion), with the number of victims reaching tens of thousands of people. The owner promised cheap Pilgrimage (Umrah) Packages to tens of thousands of his registered customers, but they never delivered on their promises and were named suspects and convicted of fraud.⁴ The case is a conventional criminal act which has long been regulated in Chapter XXV, Article 378,⁵ since the Dutch colonial era, from WvSNi 1915-1918” to the Criminal Code (*Wetboek van Strafrechts voor Indonesie* (WvSi) or Law No. 01 of 1946 on Criminal Code.⁶

Based on a processes and several court decisions of the PT. First Anugerah Karya Wisata (First Travel) case, starting from the Central Jakarta Commercial Court Decision No.

² One other thing is related to the economic, political, social, cultural background for the birth of legal products. See Moh Mahfud MD, *Politik Hukum Di Indonesia* (5th edn, Rajawali Pers 2012).

³ Restorative justice terminology was developed and practiced in the West through a series of pilot projects since the 1970s. Although the original has long been practiced in customary law, religious law or the law of ancient civilizations such as the Ur-Nammu Code (2000s Before Christ (BC). Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice: Fifth Edition* (2014) 6, 23-24. Howard Zehr and Ali Gohar, *The Little Book of Restorative Justice* (Good Books 2003) 2. Kathleen Daly and Russ Immarigeon, ‘The Past, Present, and Future of Restorative Justice: Some Critical Reflections’ (1998) 1 *The Contemporary Justice Review* 4. Brunilda Pali, ‘Restorative Justice and Conviviality in Intercultural Contexts’ (2019) XLVIII *Verifiche* 155. Paul McCold, ‘The Recent History of Restorative Justice; Mediation, Circles, And Conferencing’ in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice; A Global Perspective* (Routledge 2006) 23-24, 35-40.

⁴ Nur Rohmi Aida, ‘First Travel, Awal Berdiri, Lakukan Penipuan Hingga Akhirnya Tumbang’ *kompas.com* (17 November 2019) <<https://www.kompas.com/tren/read/2019/11/17/060000565/first-travel-awal-berdiri-lakukan-penipuan-hingga-akhirnya-tumbang?page=all>> accessed 14 August 2021.

⁵ Law No. 01 of 1946 on Criminal Code 1946.

⁶ As translated by R. Soesilo, “Whoever with the intention of benefiting himself or others by violating rights, either by using a false name or false circumstances, either by reason and deceit, or by making up false words, persuades people to give something, make debts, or write off debts, convicted of fraud, with a maximum imprisonment of four years.” R Soesilo, *Kitab Undang-Undang Hukum Pidana (KUHP); Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal* (Politeia 1995) 260-261.

105/Pdt.Sus-PKPU/2017/Pn.Jkt.Pst,⁷ the Decision of the Depok District Court (PN) No. 83/Pid.B/2018/PN.Dpk, the substance of the verdict, the defendants were proven to have committed fraud according to article 378 of the Criminal Code *jo.* Article 3 of Law No. 08 of 2010 on the Prevention and Eradication of the Crime of Money Laundering (TPPU). The panel of judges sentenced the two directors of First Travel to 18 – 20 years in prison and billions of fine with no responsibility to the victims.⁸ More sadly for the victims, based on Article 39 of the Criminal Code *jo.* Article 46 of Law No. 08 of 1981 on the Criminal Procedure Code, the First Travel assets whose ownership was never proven by the victims were confiscated by the State. Not returned to fulfil achievements to consumers or victims of fraud as revealed from the facts of previous proceedings which resulted in an amicable agreement between First Travel and the victims before the Commercial Court. Then the cassation decision No. 3096K/Pid.Sus/2018 actually strengthens the decision of the first court.⁹

The two decisions in the First Court and Cassation did not apply Article 67 paragraph (2) of Law No. 8 of 2010 on TPPU for their consideration or judgment. If they used, that evidence from the assets of legal entities resulting from money laundering offences can be returned to the victims who are entitled.¹⁰ But sadly for the victims, regarding the assets of legal entities confiscated by the State are one of the many effects of multiple losses that are not just discussed. They have suffered material and intangible losses due to being cheated, incurred extra costs to following the procedure, and suffered an immaterial - psychological burden to wait for the results (justice) from the trial process in the Commercial Court (2017) to the Supreme Court (2018). However, in the end, they did not get certainty or justice. The victims of fraud have repeatedly become victims of the

⁷ In August 22, 2017, this decision, the judge authorized the peace between the First Travel and the customer recorded in the voting that reached around 79,000 victims, with the peace agreement being between sending the customer to “*Umrab*” or returning their money (creditors) for those who decided not to go. In the future, the scheme for implementing the agreement authorized by the Central Jakarta Commercial Court shall not be done until it must be resolved criminally at the Depok District Court as a Fraud violation. *Firts Travel v Customers Putusan Pengadilan Niaga Jakarta Pusat No 105/PdtSus-PKPU/2017/PnJktPst.Aida* (n 4).

⁸ Specifically, it's 20 years in prison and a fine of 10 billion subsidiaries 8 months for the President Director. Then 18 year's imprisonment and a fine of 10 billion subsidiaries 8 months for the Director. *Andika Surachman and Anniesa Desvitasari Hasibuan (2018) PN Depok No 83/PidB/2018/PNDpk* 1016–1019.

⁹ *Andika Surachman and Anniesa Desvitasari Hasibuan (2019) Putusan Kasasi No 3096K/PidSus/2018* 394.

¹⁰ Law No. 08 of 2010 on Prevention and Eradication of the Crime of Money Laundering (Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang/PPTPPU) 2010.

offender than from the existing legal process and system.¹¹ Even as if with the help of public law conception, the state confiscates the wealth of the convicts obtained from the suffering of tens of thousands of victims, and the perpetrators of fraud seem to live free from their responsibility after enjoying the results of their fraud for years, imprisonment and fines seem to free them (the offenders) from their responsibilities and all the burden of suffering which they inflicted on tens thousands of victims. And it might be proof enough that this article (Article 378) is no more appropriate and needs to be reformulated with a new conception of justice.

When the state takes over the process of fraud prosecution, in conventional public policy, dogmatically, it is considered as a violation of the public interest and as a form of criminal policy aimed at protecting society from evil deeds and offenders. With a policy orientation centered on *daad-daader strafrecht*, where if the perpetrator cheats, then his fraud is considered and injury the public interest only so that he is sentenced to retributive-distributive criminal sanctions that rehabilitate the offender.¹² In fact, victims and offenders are individuals, which does not rule out the possibility that offenders, victims, and other parties can actually become victims of evil deeds, social injustice, and the law enforcement system. Efforts to reorient the meaning of victims, reorient the meaning of justice for offender and victim, and efforts to stop the chain of crime and its impact on other parties, have long been pursued since the emergence of a restorative concept that seeks to provide solutions to several problems of the conventional criminal justice system which its reflected in the suffering of the First Travel victims.¹³

Barda Nawawi Arief explained that politics (social policy) is the estuary of social welfare policy and social defense policy, where social defense policy includes criminal law politics, both through criminal policy and penal policy.¹⁴ Based on his explanation, the criminal policy from beginning to end must accord with the objectives of social policy. Therefore, if the criminal policies as reflected in Article 378 of the Criminal Code and their application in the field are considered no longer appropriate. Because it causes

¹¹ Detik.com, "Pilu Korban First Travel, Uangnya Tak Pernah Kembali Dan Malah Dirampas Negara" (*detik.com*, 2019) <<https://news.detik.com/berita/d-4785385/pilu-korban-first-travel-uangnya-tak-pernah-kembali-dan-malah-dirampas-negara>> accessed September 1, 2021.

¹² Peter de Cruz, *Perbandingan Sistem Hukum; Common Law, Civil Law Dan Socialist Law, Diterjemahkan Oleh Narulita Yusron* (Nusa Media 2013). CST Kansil, *Pengantar Ilmu Hukum Dan Tata Hukum Indonesia* (7th edn, Balai Pustaka 1986) 75-76. Muladi and Barda Nawawi Arief, *Teori-Teori Dan Kebijakan Pidana* (4th edn, Alumni 2010) 25-44.

¹³ Muladi, *Kapita Selekta Sistem Peradilan Pidana* (Badan Penerbit Universitas Diponegoro 1996).

¹⁴ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana; Perkembangan Penyusunan Konsep KUHP Baru* (3rd edn, Kencana 2011) 4-6.

systematic injustice, loss, and suffering, especially for the victims. Therefore, fraud crimes in that article need to be reformulated using a restorative justice approach as a new conception of justice that is considered more pro-Pancasila values (unity, deliberation, and social justice (Pancasila precepts 3rd to 5th), and the goals of social policy that written in the constitution (promoting public welfare and realizing social justice).

B. Problem Formulation

Problem formulation of this article focuses on a question “how to reformulate the crime of fraud under Article 378 of the Criminal Code based on restorative justice value?”

C. Methodology

This research is normative research.¹⁵ The data sources consist of various primary, secondary, and tertiary legal materials. Primary legal materials come from authoritative and binding materials such as statutory regulations, scriptures, or court decisions etc. Meanwhile, secondary legal sources come from various books and literatures that explain primary legal materials; and tertiary legal materials come from dictionaries, internet. These various data sources were obtained using documentary techniques and analyzed descriptively qualitatively.¹⁶ Several approaches used in this research include conceptual, philosophical, comparative and policy approach.

D. Discussion and Results

A simple discussion and analysis are focused on criminal policy reformulation in the article formula (Article 378 of the Criminal Code), and researchers try to formulate it in a restorative justice paradigm. As McCold said that "*Restorative justice is a paradigm, not a program,*"¹⁷ his statement is based on the conceptions of restorative justice that are used to a shift a paradigm, renew a basic assumption, or change lenses on how justice is reviewed and reacting crime or violations or another as a disruption of peace. It showed from how to

¹⁵ Mukti Fajar N Dewata and Yulianto Ahmad, *Dualisme Penelitian Hukum Normatif & Empiris* (1st edn, Pustaka Pelajar 2010).

¹⁶ As a type of research, the analysis of legal materials is carried out in a qualitative descriptive manner. This refers to the type of qualitative data as explained by Ahimsa-Putra, that the adjective “Qualitative” refers to the nature of the collected data. Where qualitative data is not a number but in the form of statements about various relationships (causality) between one another or statements about the content, nature, characteristics, circumstances of a thing or symptom (can be physical objects, behavior patterns, etc.), ideas, values, norms or events that occur in society). Heddy Shri Ahimsa-Putra, ‘Paradigma Ilmu Sosial-Budaya; Sebuah Pandangan’, (2009) 12, 14-15. Another purpose of qualitative research is to develop or discover a concept or theory. Suteki and Galang Taufani, *Metodologi Penelitian Hukum; Filsafat Teori Dan Praktik* (1st edn, Rajawali Pers 2018) 139, 213.

¹⁷ Paul Mccold, “Restorative Justice & the United Nations.”

reconcile, restore, and contrive or compose a peacemaking between offender and their victims when a crime or any disruption committed.¹⁸ Zehr explained, the restorative justice paradigm is the opposite of the current criminal justice paradigm that views crime as violating the letter of the law only; justice is focused on both, only establishing blame or guilt, viewing justice only as administering pain or punishment, the offender is pitted against the state, etc.¹⁹ All of it is due for the importance of the function of legal substance is as a legal guidance in law enforcement and its apparatus.

1. Theoretical Review

Restorative Justice was developed from confusion for decades in responding to a global phenomenon that since 1958 when the term restorative justice was coined by Albert Eglash because of its emphasis on the aspect of restitution, the term is actually taken from the concept of prophetic justice contained in the Bible.²⁰ Now, the United Nations Office on Drugs and Crime (UNODC) defines restorative justice as a variety of approaches that promote safe participation in solving a problem involving victims, offenders, their social networks, the community, and agents of justice (judicial institutions/government or non-governmental customary institutions).²¹ That must be consistent while taking into account the human honor and balance of the needs and interests of the parties, which consist of victims, perpetrators, and community or the state in general.²² Basically, restorative justice is based on the assumption, that crime or criminal behavior is not only against the law, but also

¹⁸ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (Herald Press 1990); John Braithwaite, "Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?" in Andrew Von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (1st edn, Hart Publishing 2003).

¹⁹ Howard Zehr, 'Justice Paradigm Shift? Values and Visions in the Reform Process' (1995) 12 *Mediation Quarterly* 207-209.

²⁰ Previously, several terms that inventoried by UNODC refer to the same meaning, concept, description and philosophy, are: communitarian justice, making amends, positive justice, relational justice, community justice or traditional justice. In Van Ness inventory are: indigenous justice, informal justice, restitution (in 4th edition) or reparative justice (in 5th edition), social justice. In addition, Van Ness explains that Albert Eglash used the term in 1977 to distinguish it from the conventional (retributive) criminal justice system. However, after being traced it turns out to have been used in the Eglash article since 1958. United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (1st edn, United Nations 2006) 6. Van Ness and Strong (n 3) 15, 23-24. Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice: An Introduction to Restorative Justice* (4th edn, Matthew Bender & Company, Inc 2010) xi, 12-17, 21-22.

²¹ "Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community". United Nations Office on Drugs and Crime (n 4) 5-6; In the latest sense, UNODC releases a simpler definition that seems to define restorative justice as an alternative to achieving justice. United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes Second Edition* (2nd edn, United Nations 2020) 4, 78.

²² Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (Herald Press 1990) 181. United Nations Office on Drugs and Crime (n 4) 1-2, 6.; Howard Zehr, *The Little Book of Restorative Justice* (Good Books 2014) 39. Xiaoyu Yuan, *Restorative Justice in China: Comparing Theory and Practice* (Springer International Publishing 2017) 149.

considered conflicts and immoral acts, that tarnish certain norms in a society, violations that cause harm to people-victims and their interpersonal relationships, and disruption of the harmony and peace of the community.²³

Based on several assumptions, the restorative concept and process require and identical to the following two things: *first*, a moral vision or viewpoint that comes from religious faith or philosophical commitment.²⁴ *Second*, encouragement and participation from various stakeholders, especially community institutions or certain religious/belief communities in teaching and setting standards of moral and ethical values that build society, harmony, and the peace of the community.²⁵ In addition, it is because, in the concept of restorative justice, all are assumed to be connected to each other in a certain network and relationship.²⁶ Therefore, in the concept of restorative justice, when someone is violated, harmed, and becomes a victim, the victim is not only a person who is affected by a particular crime directly (direct victim). Rather, the definition of the victim can be expanded to include various parties who suffer, are harmed, and are injured. In this case, it is the family of the victim, even the offenders, and his family, the community, and the state, and anyone who has a relationship with the direct victim. They are considered secondary victims who may be affected by the crimes (indirect victims).²⁷ Each party, from the victim, the offender, various other parties involved and/or affected by the occurrence of the crime (society and/or state), they have an opportunity to participate directly and concretely to find solutions and resolve a conflict that occur between them. In these processes they are given some authority to control the results to make things right,²⁸ including reconciliation, forgiveness, repairing damage (restitution, healing wounds or damages), re-establishing relationships, restoring balance - peace, and/or promote harmony.²⁹

²³ Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 18); United Nations Office on Drugs and Crime (n 20). Departement of Justice Canada, "Values and Principles of Restorative Justice in Criminal Matters."

²⁴ Howard Zehr, 'Restorative Justice Beyond Crime; a Vision to Guide and Sustain Our Lives' (2019) XLVIII Verifiche 4-5.

²⁵ Restorative Justice Fundamental Principles, Drafted by Ron Claassen, revised May 1996 UN Alliance of NGOs Working Party of Restorative Justice in Daniel W Vanness and Pat Nolan, 'Legislating For Restorative Justice' (1998) 10 Regent University Law Review 103-104. Zehr, 'Restorative Justice Beyond Crime; a Vision to Guide and Sustain Our Lives' (n 8) 5.

²⁶ Zehr and Gohar (n 3) 38.

²⁷ United Nations Office on Drugs and Crime (n 5) 4; Vanness and Nolan (n 9) 103-104.

²⁸ Zehr and Gohar (n 3) 33. Zehr, *The Little Book of Restorative Justice* (n 6) 40. United Nations Office on Drugs and Crime (n 19) 6.

²⁹ In this process, according to UNODC, it can be used as a means of transforming the relationship between society and the existing justice system. United Nations Office on Drugs and Crime (n 4) 5-6; Pali (n 3) 155-156; Departement of Justice Canada (n 23). Zehr, *Changing Lenses: A New Focus for Crime and Justice*

The role of governments in restorative justice is substantially reduced. That because as assumed in restorative lenses, crime is a violations to private relations between people, rather than public matter.³⁰ On the one hand, as in explained in “*Handbook on Restorative Justice Programmes*,” the government officials or customary council (Non-Government Organization (NGO) can sue to facilitate or create a conditions in which victims and offenders can reconcile.³¹ Additionally, the parties involved are placed directly in the same position but still focus on the victim as a central position to be able to control, explain and restore his rights, harms, and needs in a balance of the offenders, facilitator, and other parties interest. Meanwhile, offenders are encouraged to take responsibility as a step to correct the mistakes they have made.³² For this reason, a restorative process that follows the values of deliberation and unity is a process in which victims, offenders, and if necessary various other parties, both individuals and community members affected by the crime are allowed to participate actively together in solving problems that arise from the crime, with the help of a facilitator, with various forms such as reconciliation, conference, or a circle of punishment, etc.³³ While restorative outcomes are settlements reached as a result of the restorative process, covering various responses and various restorative programs, such as reparations, restitution, social services aimed at meeting the needs of individuals (each party) and the community as well as facilitating responsibility and reintegration the parties, especially between the offender and the victim.³⁴ Its focus and orientation are on problem-solving, balancing needs and interests, peace, reparation, and/or harmony for the future as restorative justice objectives and goals.³⁵

Christian Peace Shelf Selection (n 6) 81-82, 181-184. Andrei Poama, ‘Corrective Justice as A Principle of Criminal Law: A Prolegomenon’ (2018) 12 *Criminal Law and Philosophy* 621; Jim Considine, ‘The Third Millennium: Restorative Justice or More Crime and Prisons?’ 1 *Sri Lanka Journal of International Law* 5.

³⁰ Mutaz M Qafisheh, ‘Restorative Justice in the Islamic Penal Law: A Contribution to the Global System’ (2012) 7 *International Journal of Criminal Justice Sciences* 487.

³¹ United Nations Office on Drugs and Crime (n 20) 67.

³² Stovel and Marta Valiñas, ‘Restorative Justice after Mass Violence: Opportunities and Risks for Children and Youth’ (2010) 2010–15 vi, 26. Qafisheh (n 29) 487-488. Paul Mccold, ‘Restorative Justice & the United Nations’ 15.

³³ United Nations Office on Drugs and Crime (n 4) 7; Daly and Immarigeon (n 3) 21-23; Daniel W Van Ness, ‘Restorative Justice as World View’ [2013] *Restorative Approaches to Conflict in Schools: Interdisciplinary Perspectives on Whole School Approaches to Managing Relationships* 32, 1-2; Qafisheh (n 14) 487. ECOSOC Resolution 2000/14 Basic Principles On The Use of Restorative Justice Programmes In Criminal Matters 2000 at 35 (2000). Section I, part.2, 3. ECOSOC Resolution 2002 / 12 Basic principles on the use of restorative justice programmes in criminal matters 2002 Section I, part.2, 3.

³⁴ ECOSOC Resolution 2002 / 12 Basic principles on the use of restorative justice programmes in criminal matters Section I, part.2, 3, 5, 18, 19.

³⁵ Zehr, *Changing Lenses : A New Focus for Crime and Justice* *Christian Peace Shelf Selection* (n 6) 80-81, 181, 184-185. Zehr and Gohar (n 3) 31. Muladi, *Kapita Selektta Sistem Peradilan Pidana* (Badan Penerbit Universitas Diponegoro 1996) 125-129.

2. Reformulate Restorative Values in Criminal Policy on Fraud in Article 378

Based on the First Travel case, although the inequality and injustice in the verdict of that fraud case was justified legally and dogmatically. Legally based on Article 163 of the *Herzien Inlandsch Reglement (HIR)/Article 283 Rechtreglement voor de Buitengewesten (RBg)* in conjunction with (*junto (jo.)*) Article 165 of the Civil Code, anyone who recognizes a right must indeed prove it. Apart from that, it is also due to the seizure of assets of a Limited Liability Company (PT) from the convict as an implementation of the separation of company assets (*Rechtspersoon*) and legal subjects (*Naturlijkepersoon*) in Article 3 paragraph (1) of Law No. 40 of 2007 on Limited Companies. Referred to Law No. 01 of 1981 on the Criminal Procedure Code, Law No. 02 of 1986 jo. Law No. 08 of 2004 jo. Law No. 49 of 2009 on General Courts, Law No. 08 of 2010 on TPPU, and Law No. 37 of 2004 on Bankruptcy. Inconsistent legal decisions are also caused by the separation of trials and decisions within the scope of the Commercial Court, District Court, to the Supreme Court.

Some causes of inequality and injustice are also due to the dogma that applies to the legal process, namely the dogma of the separation of private law and public law.³⁶ Where criminal law is identified with the protection of the public interest and civil law is identified with the protection of private interests, separate from each other, and not combined with each other in the process.³⁷ Even though formally, public and private law are juridical specially handled under the general court authority, namely the District Court for criminal cases (for criminal fraud) and the Commercial Court for civil cases (for default or breach of contract related to bankruptcy).³⁸

³⁶ As explained by Peter de Cruz and Peter M. Marzuki, the first person to divide the study and practice of law into public and private since 200 AD was Ulpian or Ulpianus, a Roman jurist. Quoted from van Dijk, Ulpianus explained the division of Roman law in public and private in Latin which more or less means stating that the study of law covers two fields, namely the field of public and private law. Public law is related to Roman state regulations which are considered to serve the interests of the community or deal with matters related to the state, while private law is related to arrangements that seek to protect and serve individual interests or deal with inter-individual problems. Peter M Marzuki, *Pengantar Ilmu Hukum; Edisi Revisi* (1st edn, Prenada media group 2018); de Cruz (n 12).

³⁷ The legal dogmatic consideration that individual interests is considered as public interests refer to the codification of criminal law and its regulations in each country. And in the Indonesian context, it refers to the Criminal Code. On the contrary, the individual's interest is considered the main thing that is protected in private law, referring to the codification of civil law, from both two different codifications, rise up a gap between public law and private law, and gives rise to the doctrine that the two are considered opposite and incompatible with each other. de Cruz (n 25) 108-109; Kansil (n 25) 73-75, 257-258.

³⁸ The absolute authority of the district court to examine criminal and civil cases at the first level is regulated in Article 50 and the absolute authority of the district high court to examine appeals is regulated in Article 51 of Law No. 2 of 1986 on General Courts. Regarding fraud cases, which include money laundering, the examination process must be prioritized. Article 57 of Law No. 08 of 2004 on Amendments

Various dogmatic juridical regulations that justify absolute state authority in criminal law enforcement are characteristics of the retributive justice system, and on average they are contrary to the restorative justice system.³⁹ As reflected in the legal process for the First Travel fraud case. Starting from the investigation process to the trial which shows the supremacy of law enforcement officers against *daader* in processing their fraud (*daad*) assumed to be violating certain articles. In the retributive justice system, the fraud is considered a violation of the law and acts against the State represented by its apparatus.⁴⁰ In addition, the fraud is also considered as an act against the public interest, even though what is actually harmed is the interest of the individual (the victims of fraud). For example, in the trial process, this can be seen from the existence of a public prosecutor who represents the People to challenge defendant personally, in an unequal bargaining position.⁴¹ In addition, victims of fraud crimes seem to only be considered as accessories to ensure fair sanctions in a retributive-distributive paradigm, because they are only being asked for information or testimony without being able to determine what sanctions decisions the defendant or convict should receive for their crimes against them (victims). And only if lucky, because usually only a few of the victims who can give information or witnesses. Usually shown in every criminal act, victims are not guaranteed involvement in a legal process from the violations or injuries suffered by them.⁴² Accordingly in the pattern of the retributive justice system with distributive justice, the process of fraud prosecution under Article 378 of the Criminal Code emphasizes how to impose criminal sanctions on criminal acts that harm the victim (the state), the status of the victim is fake because its token by the state, and although the offenders is being blamed for their offence and harms they have done to the actual victims (real victims as in First Travel case), on the other side, the penal sanctions they (offenders) receive is like a gift, because they got the facilities for rehabilitation from the state.⁴³ It is far from moral learning that the criminal act committed by the convict (offenders) is an immoral and wrongdoing that caused an

to Law No. 2 of 1986 on General Courts. see also Article 1 point 7 of Law No. 37 of 2004 on Bankruptcy and Postponement of Obligation for Payment of Debt (KPKPU), it is stated that the commercial court authorized to examine bankruptcy cases is within the general court authority.

³⁹ Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 6) 80-81, 181-185; Zehr, 'Justice Paradigm Shift? Values and Visions in the Reform Process' (n 30) 208-210.

⁴⁰ Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 18); Zehr, "Justice Paradigm Shift? Values and Visions in the Reform Process" (n 19).

⁴¹ Muladi (n 17) 125-129; Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 6). Kansil (n 25) 73-76; Marzuki (n 31) 184, 187, 191-192, 194.

⁴² Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 18); Zehr, "Justice Paradigm Shift? Values and Visions in the Reform Process" (n 19).

⁴³ Zehr, *Changing Lenses: A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 18).

obligation in various responsibilities to the victim for the harms he has done.⁴⁴ The result of the conventional justice system is keeping away the *daader*/convicted offenders from their real responsibilities. And by neglecting dialogue, responsibilities, or forgiveness or another restorative pathway among the offenders, the victims, and other parties from the secondary victim. Because only a unilateral judgment from the State against the act/violation of the ‘*daader*’ is the only law for the offenders. Furthermore, it's caused the stigma and negative impact of harmful and immoral acts is always remained attached to the parties, especially the offenders and victims.⁴⁵

Based on the description above, therefore, in this sub-discussion, it is necessary to reorient the Article and its policy. The reorientation of criminal policy on criminal fraud (Article 378) can start by changing some basic assumptions and assessments of the related crime, including:

- a. The crime of fraud must be viewed and assessed as an immoral and asocial act that tarnishes moral values, social norms, injures/harms the victims and their relationship, or violation on people and of interpersonal relationship rather than just breaking the law;
- b. The crime of fraud must be viewed and assessed as a conflict, a problem, and is actually a violation of civil law in the context of protecting individual rights as primary protection and protecting public rights as secondary protection;
- c. The central point and orientation in assessing violations (completion of criminal acts) is aimed at problem-solving and reparations for the future of the parties rather than judgment that only focuses on the offender and/or his criminal act;
- d. The normative value of criminal fraud in related articles must allow it to be built on the basis of dialogue involving the parties from the perpetrator and the victim, either by means of penal mediation by judges or public prosecutors or by another policy;
- e. Accountability of offenders of crimes against victims has actively functioned;
- f. The justice of criminal fraud is built on the basis of an agreement and/or sanctions as a means of a reparative nature, it must be stated in the legal substance that adopt restorative outcomes or its values;

⁴⁴ Zehr explained, the violations on people and of interpersonal relationship is create an obligations and responsibility. the central of obligations is responsibilities to put right the wrong came from. All of it focuses on harms and needs of each parties, especially for the direct victims, but communities and the offender is too. Muladi (n 17); Zehr, *Changing Lenses : A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 6); Zehr and Gohar (n 3) 31. Zehr, *The Little Book of Restorative Justice* (n 6) 64-69. Zehr, ‘Restorative Justice Beyond Crime; a Vision to Guide and Sustain Our Lives’ (n 8) 8-9.

⁴⁵ Consedine (n 29); Muladi (n 13); Zehr, *Changing Lenses : A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 18).

g. Negative stigma from the offender's actions (criminal fraud) can be removed based on restorative outcomes and processes, especially from the victim's perspective.

Considering some basic thoughts in criminalizing from Sudarto, among others:

- a. Criminal policy must be in accordance with the philosophical values in Pancasila and the goals of the state;
- b. Conduct that is proscribed are actions that are not desired because they endanger or harm members of the community or are contrary to moral-religious morality;
- c. Must consider aspects of costs and results;
- d. Attention is paid to the capacity and workload of the apparatus.⁴⁶

Based on explanation above, the implementation (enforcement) of Article 378 of the Criminal Code is not in accordance with the value of unity from the 3rd precept, the value of deliberation from the fourth precept, and hinders the achievement of social justice from the 5th precept. This can be seen from the law enforcement process which further widens the gap and damages the relationship between the victim and the offenders, the number of victims who are denied, harmed, and do not get justice in the law enforcement process for the fraud from related article.⁴⁷ As explained before, court decisions series of this case illustrate this.⁴⁸ Additionally, it can be seen from the continued prevalence of various fraud crimes that cause victims and losses that are always repeated in the community, that increase year by year: from 2.142 in 2016 to 9.813 in 2017 to 18.362 in 2018 and 9.452 in the 1st semester of 2019.⁴⁹ Additionally, the length of the legal process (the First Travel case is from 2017 as civil case in the Commercial Court; became criminal case (from 2018) within its levels, and is still, in the progress in 2020)⁵⁰ plus the material and immaterial costs of the process do not guarantee justice for the aggrieved parties, especially for the victims. Meanwhile, from recidivism side, there is no certainty that the

⁴⁶ Arief (n 27) 31.Syaiful Bakhri, *Perkembangan Stelsel Pidana Indonesia* (1st edn, Total Media 2009) 77-78.

⁴⁷ Criminal Code, art. 378.

⁴⁸ *Firts Travel v Customer Putusan Pengadilan Niaga Jakarta Pusat No. 105/Pdt.Sus-PKPU/2017/Pn.Jkt.Pst* (n 7); *Andika Surachman and Anniesa Desvitasari Hasibuan (2018) PN Depok No. 83/PidB/2018/PNDpk*. (n 8); *Andika Surachman and Anniesa Desvitasari Hasibuan (2019) Putusan Kasasi No. 3096K/Pid.Sus/2018* (n 9).

⁴⁹ Data above is the total of 2 kind of a fraud: 1) conventional fraud which amounted to 2,068 (2016), 9,779 (2017), 16,587 (2018). 2) Modern fraud through electronic media 74 (2016), 34 (2017), 1,775 (2018) 1,883. The number of Semester I of 2019 is only from conventional fraud (9,452). As comparison of fraud data which tends to increase from 2016-2018 to mid-2019. The highest class of conventional crimes in 2018 was the type of theft crime with a total of 19,380 cases, then fraud or criminal act of cheating took second place with a total of 16,587 cases; and the highest increase in conventional criminal acts is fraud with a percentage of 373.96%, its 2,068 total cases in 2016 increasing to 9,773 total cases in 2017. Pusiknas Bareskrim Polri, 'Jurnal Kriminalitas Dan Lalu Lintas Dalam Angka Tahun 2018 Dan Semester I 2019' (2019) 43, 110, 126-128.

⁵⁰ Aida (n 4).Vitorio Mantalean, "First Travel Akan Ajukan PK, Minta Aset Yang Dirampas Negara Dikembalikan" (*kompas.com*, 2020) <<https://megapolitan.kompas.com/read/2020/08/10/12565791/first-travel-akan-ajukan-pk-minta-aset-yang-dirampas-negara-dikembalikan?page=all>> accessed September 1, 2021.

fraud will not be repeated, nor is there a deterrent effect that reduces the occurrence of fraud. Because of this, the law enforcement process that focuses on the past and is carried out with difficulty is far from satisfactory. Because it increases the workload of the apparatus to solve the same fraud case, repeats itself, and is increasingly rampant.⁵¹ (their data from National Criminal Information Center of the Indonesian Republic Police or Pusiknas Polri above prove itself).

Based on the main points above, related to the reorientation of values - criminal policies in the crime of fraud (Article 378). There are several options that can be taken to adopt a restorative concept and its values in criminal policies context, including, *first*, formulating the crime fraud (Article 378) as part of pure private law, as the act of cheating and crime of fraud begins with a civil legal relationship. This policy is quite extreme but is based on the originality of actions that refer to objects and legal actions in the civil sector. At first glance, this is the most extreme policy context that can be taken, and perhaps the riskiest that can be decided, namely, to make the crime of fraud remain an act of default (breach of the contract) in the civil law context, rather than a violation of the law in the criminal law context. In this fraud decriminalization policy, the State remains present in the occurrence of fraudulent acts through strict regulations, empowerment and assistance from structural institutions, alternative institutions, and/or existing law enforcement officers. In this case, if necessary, the victims of each individual can use various State instruments (institutions and apparatus) and/or alternatives to represent them and force the offenders to continue to fulfill all promised achievements. However, the various instruments and alternative institutions are only oriented to guarantee and protect the personal interests of each victim, which is realized through the implementation of achievements, nothing more. This is important, so that the rights and interests of the creditor in the debtor remain guaranteed and continue to be carried out according to mutually agreed promises. So that problem solving is only placed in the realm of civil law

⁵¹ Some of the descriptions of these problems are classic problems of the criminal law system in various Western countries and are the background for the search for alternative solutions and the implementation of restorative justice in various pilots project. United Nations Office on Drugs and Crime (n 20); Zehr and Gohar (n 3).Ivo Aertsen, "The Idea of Restorative Justice and How It Developed in Europe," vol 32 <https://www.euforumrj.org/sites/default/files/2020-01/the_idea_of_restorative_justice_and_how_it_developed_in_europe.pdf>.Edit Törzs, 'Restorative Justice Approaches in Intercultural Conflict Settings – Findings of a Survey and Implications for Practice' (2014) 2 Temida 87, 98-99.

which allows deliberation in the format of mediation-conciliation, forgiveness, dialogue between victims and offenders, compensation, etc.⁵²

Second, formulating the crime of fraud (Article 378) as part of public law in a private-oriented context. This can be done by making the article formulation of the crime of fraud a complaint offence rather than a general offence, by enacting it article in the format of an absolute '*Klachtdelict*'. From this point of view, the crime of fraud has been assumed to be considered as a violation that harms the rights of the victim rather than the rights of the public (the State) than its formulation focuses on harms and needs of the victims. So that there is a time lag that can be used between victims and perpetrators to carry out processes outside the existing legal system, such as alternative mediation or deliberation by the parties. With the authority to revoke cases owned by victims in the existing legal process, whether the complaint is withdrawn due to forgiveness or deliberation that results in an agreement from the parties involved, the law enforcement process is stopped. The policy of making the crime of fraud as an absolute complaint offence has reflected part of the restorative value through the possibilities of forgiveness, reparation, and dialogue between the perpetrator and the victim outside the process, where the victims have a bargaining position against the offenders, and this is also more reflects a criminal policy that prioritizes the principle of subsidiarity (*ultimum remidium*), and victims' rights that are thick with restorative elements.⁵³ Even though there are weaknesses and doubts regarding the effectiveness and guarantees related to recidivism because after a complaint is withdrawn, it cannot be filed again in a case for the same reason. The requirement for implementing this policy is the high responsibility and awareness of good ethics, character, and morals from each people.

⁵² As Muladi and Poama explain: "The decriminalization policy above is the impact of the full application of restorative justice values (make it as full restorative resolution). On the one hand, is the totality of the application of restorative justice values, but on the other hand, the apparatus and criminal law policyholders are seen as criminal law civilizations and are considered as a negative impact of the full restorative policy proposed by the abolitionist movement". This is a necessity that certainly comes from the implementation of the full restorative policy that Muladi feared. However, to solve the problem of fraud in a full restorative manner. Along with the role, control, and empowerment of government institutions provided by the government itself. The negative impact of de-professionalization and de-formalization of this full restorative policy can be minimized as low as possible and on the other hand, can encourage the high success of this policy by implementing various agreements between perpetrators and their victims under the supervision of certain institutions. Muladi (n 13); Poama (n 29).

⁵³ See Article 1 Number 25 of the KUHP Law No. 08 of 1981 on Criminal Procedure Code (KUHP) 1981. See Article 72 until 75 of the KUHP Law No. 01 of 1946 on Criminal Code. Zehr, 'Restorative Justice Beyond Crime; a Vision to Guide and Sustain Our Lives' (n 8) 8. PAF Lamintang and FT Lamintang, *Dasar-Dasar Hukum Pidana Di Indonesia* (3rd edn, Sinar Grafika 2018) 217-219.

Third, keep the formulation of related article of criminal act as in the Criminal Code before (a part of public law), but restorative value and its aspect only to be formulating and enacting in penal policy as in penal regulation only (sentencing rules). This policy is reflected as in 2019 Bill of the Criminal Code, Section (Chapter) XXVII; Fraud Criminal Act; Part 1: Fraud: Article 498,

*"Any person who with the intention of unlawfully benefiting himself or another person by using a false name or false position, using deception or a series of lies, moving people to give up an item, giving debts, making claims of debts, or writing off debts." sentenced for fraud, with a maximum imprisonment of 4 (four) years or a maximum fine of category V."*⁵⁴

jo. Chapter III; Part 1: Purpose and Guidelines for Sentencing, Article 51 to Article 63; and Part Two: Penal Sanction and Measure (*maatregel*).

Based on compared article between Article 378 and Article 498 of the 2019 Bill of Criminal Code, at a glance the formulation also looks the same as the formulation in Article 378 of the Criminal Code. The slight difference is only in the addition of Category IV fines and the formulation of facultative or alternative threats as stipulated in Article 71 of the 2019 Bill of Criminal Code.⁵⁵ But as explained before, restorative concepts and approaches in the context of sentencing are embodied in several penal policy below, include:

a. Formulated in the Purpose of Sentencing Article 51 paragraphs c and d, stated that:

*"Resolving conflicts caused by criminal acts, restoring balance, and bringing a sense of security and peace in society; d, growing a sense of regret and freeing the guilt of the convict."*⁵⁶

This is like some of the objectives of restorative justice;

b. Formulated in the Guidelines for Criminalization Article 54 paragraph (1) letters g, h, i, j, and k which regulates the provisions for considering the imposition of sanctions that pay attention to:

*"g. curriculum vitae, social condition, and economic condition of the perpetrator of the crime; h. criminal influence on the future of the criminal act maker; i. the effect of the Crime on the victim or the victim's family; j. forgiveness from the victim and/or his family; and/or k. values of law and justice that live in society."*⁵⁷

Some of these considerations are appropriate and full of restorative value.

⁵⁴ the Indonesian Parlemtent and the ministry of law and human Right, Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP) Draf September 2019 2019.

⁵⁵ *ibid* n 54.

⁵⁶ *ibid* n 54.

⁵⁷ *ibid* n 54.

- c. Sentencing that is not intended to degrade human dignity (Article 52 of the 2019 Bill of Criminal Code), in accordance with the principal values of restorative justice related to respect and humans honor with their rights.

The 2019 Bill of the Criminal Code has also adopted restorative values in the formulation of sanctions, including:

- a. The adoption of restitution as a means of repair and compensation that takes into account the needs of the victim, which is regulated in Article 66 paragraph (1) letter d "compensation" as "additional punishment"; or Article 65 paragraph (1) letter f jo. Article 96 "Fulfillment of customary obligations" which can be alternatively punished with compensation. In a decision, both can be accumulated with other crimes and actions even though they are not formulated in the related article (Article 94 in conjunction with Article 97);⁵⁸
- b. The adoption of restorative sanctions that are full of values oriented towards social services, namely in Article 65 paragraph (1) letter e "Criminal work for social work."⁵⁹

Based on the explanation above, it can be seen that the policy choice made by the formulator of the Bill of the Criminal Code is to continue to formulate the crime of fraud as part of public law in retributive justice system– and it might accidentally juxtapositioning it with restorative justice principles. Because, however, even so, the restorative aspect, values and principle is only accommodated in the penal policy in general rules. And may be its what Zehr and Gohar meant by that "*Restorative justice is not necessarily the opposite of retribution or Restorative justice neither a panacea nor necessarily a replacement for the legal system.*"⁶⁰

3. *Klacht*delict as a Reflection from the Restorative Justice Value

*Klacht*delict is Dutch language which mean a complaint. According to Article 1 point 25 of the Criminal Procedure Code, a complaint is a notification accompanied requested from an interested party that is harmed to an authorized official to take legal action against a person who has committed a criminal offence (complaint) against victims (interest party). In the case of a complaint, it can only be processed legally, if there is a complaint (request) from a person who has experienced, seen, witnessed, and or is a victim of an event that is a criminal act. Lamintang further explained that what is meant by a complaint offence is an offence that can only be prosecuted because of a complaint from the aggrieved party. Complaint offences that acknowledge the existence of elements of restorative justice from

⁵⁸ *ibid* n 54.

⁵⁹ *ibid* n 54.

⁶⁰ Zehr and Gohar (n 3) 10-11.

"Harms and needs of the victim" as one of the pillars and restorative elements. Divided into 2 kinds of *klachtdelict* between relative and absolute. Absolute complaint offence (absolute *klachtdelict*) is a crime that cannot be prosecuted, if there is no complaint from the victim who is harmed or embarrassed by the occurrence of the crime, because in an absolute complaint crime what is demanded is not the law but, in the event, or its incident. In this kind of offence, another restorative aspect is shown from the term of victims which can be expanded to another parties as a victim, it refer to Article 73 of the Criminal Code when the direct victim is passed away a complaint can be handled by his parent, child, husband, or wife, etc as a secondary victim.⁶¹

Based on restorative justice lenses, every human being is assumed bounded, related to one another, and have a relationship that is interconnected with each other.⁶² One manifestation of this assumption, if a mother becomes a victim of fraud, who is a victim in the concept of restorative justice is not only the mother as a direct victim. But everyone connected to the mother such as her husband, children, and all those who have relationship to the mother also become secondary victims.⁶³ Therefore, in the concept of restorative justice, the formal value orientation in its law enforcement and procedural law is identical to return the control of the process and/or sanctions determination to interested parties (direct victims and/or his parties). The parties from the victims, offenders, and the community, are allowed to settle violations, conflicts, and problems that occur between them.⁶⁴ According to UNODC and Zehr, they explain that the following thing below are several keys and principles of justice restorative: the victims, harms as the impact of the crime on them, their needs, the rights and obligations that the offenders owe them (include his responsibility), involvement of each parties during the process or their participations, and the offenders' efforts to put right the wrong to treat wounds or compensation or repair their relationships

⁶¹ See Article 1 Number 25 of the Criminal Procedure Code jo Article 72 until 75 of the Criminal Code. Zehr, 'Restorative Justice Beyond Crime; a Vision to Guide and Sustain Our Lives' (n 8) 8. PAF Lamintang and FT Lamintang, *Dasar-Dasar Hukum Pidana Di Indonesia* (3rd edn, Sinar Grafika 2018) 217-219.

⁶² Zehr and Gohar (n 3) 38.

⁶³ United Nations Office on Drugs and Crime (n 5) 4; Vanness and Nolan (n 9) 103-104.

⁶⁴ This is the process and approach of restorative justice defined by UNODC as an alternative pathway to justice that offers to offenders, victims and the community. Qafisheh (n 14) 487; Stovel and Valiñas (n 14) 101; Muladi (n 17) 125-129. United Nations Office on Drugs and Crime (n 5) 4. Muhammad Rusydianta, 'Absorpsi Konsep Qisas Hukum Pidana Islam Dalam Regulasi Pembaharuan Hukum Pidana Indonesia Di Masa Mendatang (Studi Kritis Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP) 2015 Terkait Bab XIII-XXV Tindak Pidana Pembunuhan Dan Tindak Pi' (Universitas Islam Indonesia 2016) 337.

(reintegration include).⁶⁵ And limited scale of the characteristics and keys above can be seen in the formulation of the complaint crime (*klachtdelict*).

Based on explanations above, specifically, except the provisions regarding complaint crimes (*klachtdelict*) in the Criminal Procedure Code and the Criminal Code as explained before. The formulation in Criminal Code was held on and look would be enacted in future by enacting the Bill of Criminal Code (Article 27 of the 2015 Bill of Criminal Code Articles 24 to Article 30 of the September 2019 Bill of Criminal Code) become the next Criminal Code. Its shown in the following provisions below: 1) It is impossible to prosecute criminals from the type of complaint crimes (Article 24 of the 2019 Bill of Criminal Code), except through complaints from victims who claim to have been harmed by the perpetrator's actions (same as Criminal Code and Article 1 point 25 of the Criminal Procedure Code); 2) There are provisions for revocation of complaints from victims against perpetrators that allow dialogue, forgiveness, agreement and other restorative elements (Article 30 of the 2019 Bill of Criminal Code); 3) There are provisions regarding the relationship of guardianship, forgiveness or representatives of the victim as a party who can represent the victim to complain, if the victim is not yet 16 (sixteen) years old or has died. The guardians of the child (under 16 years), parents, children, wives or husbands or other parties related to the victim (who passed away) can represent victims' complaints. (Article 25 to Article 27 of the 2019 Bill of Criminal Code).⁶⁶

The policy to holding on the old rules above shows the implementation of the restorative principle, inadvertently. Because the academic scripts of the Bill of Criminal Code in 2015 still explain that the concept of restorative justice still would insert it in Bill of Criminal Code start from that year (2015),⁶⁷ while restorative justice value in *klachtdelict* of KUHP still held on in the future (Bill of the Criminal Code), that indicates that part of the restorative justice values is had been in Criminal Code more than a century (1918-1946, 1946-2021),⁶⁸ inadvertently too. Because the development of western

⁶⁵ Zehr, *The Little Book of Restorative Justice* (n 6) 40; Zehr and Gohar (n 3) 33-38; United Nations Office on Drugs and Crime (n 4) 6.

⁶⁶ the Indonesian Parlemtent and the ministry of law and human Right Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP) Draf September 2019 (n 54).

⁶⁷ Its based on explanatation of the drafting team of academic script of the Bill of Criminal Code in 2015. the Indonesian Parlemtent and the ministry of law and human Right, Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP) Draf 2015 dan Rancangan Penjelasannya 2015.

⁶⁸ If behave wisely analyze and compare it. When there are provisions that allow other parties to appear as victims because they can complain on behalf of the victim or on behalf of the victim. At first glance, it is shown that these provisions are similar to the civil provisions as look like in Article 6 of Law No. 1 of 1974 on Marriage and Article 21 of the Compilation of Islamic Law (KHI). Although the

restorative justice is begun and was theorized from the 1970s and still developed, although had been applied in ancient law such as in Hammurabi Code (1700s BC), Lipid-Ishtar Code (1875 BC), Ur-Nammu Code (2050 BC).⁶⁹

Based on the explanation above, even though the policymaker might not realize it when the provisions of *klachtdelict* of the Criminal Code is still reformulated in the Bill of Criminal Code is an indication of appreciation and reflects the following restorative values, including:

First, the recognition of the human connection and their relationship which tie them up.⁷⁰ This is recognized and accommodated in the formulation of the article and the process of law enforcement which is shown in the expansion of the meaning of victim which consists of direct victims and indirect victims from victim parties, whether their parents or guardians, children, wife or husband or other parties who are related by blood, etc. even if only in specific conditions.

Second, accommodate the orientation and focus of protection aimed at victims and their individual rights as well as their varied needs. Among other things, related to the restorative process, the control is given to complaining about their harms and/or losses as the basis for the claim and the authority to withdraw the complaint. Although the role of the victim does not come down to determining sanctions or is only in the limited procedure. Because of the rights and various state interests to protect the public and a community makes it still monopolizes the process. However, the vital role of the victim who has the right to complain and withdraws the complaint. both provisions are enough to prove and show the existence of the value of restorative justice in the balance of criminal policy between harms, needs, interests of the parties (offender-victim) and the state (assumed as a community and public interest).⁷¹

explanation of the 2019 RUU KUHP does not explain to that point (come from civil regulation), at first glance, it is nothing but a reformulation of Article 72 to Article 75 of the KUHP remained or held on by a policymaker in the RUU KUHP. However, the old provisions in the draft new criminal law are indeed identical and seem to have adopted the civilization of criminal law as Muladi feared as a negative impact of restorative justice. But at last, the existence of these provisions only indicates that in the past when WvSi or Code Penal (part of Napoleon Code) was made, part of the provisions in the complaint offence was indeed taken from the concept of guardianship, human nature, and civil law representation. But Lamintang explains the history of *klachtdelict* which contains a part of restorative values, their explanation cited from *memorie van toelichting*, and the explanation concludes that the origin of *klachtdelict* provisions and its restorative values is still unknown unless only identified as a policy taken by the formulators of WvSi and the Dutch parliament when enacting WvSi. See Law No. 01 of 1946 on Criminal Code. Lamintang and Lamintang (n 47) 219-221. Muladi (n 13). Syaiful Bakhri, *Sejarah Pembaruan KUHP & KUHAP* (1st edn, Total Media 2011).

⁶⁹ McCold (n 3) 23-24, 35-40. Van Ness and Strong (n 4) 7.

⁷⁰ Zehr and Gohar (n 3) 38.

⁷¹ United Nations Office on Drugs and Crime (n 4) 1-2, 7; Zehr, *The Little Book of Restorative Justice* (n 6) 31-34, 64-69.

Third, assuming a criminal act committed by the offenders against the victim is semi-conflict. This is because a criminal act is not absolutely considered to violate the law only, but as formulated in the related articles it is also assumed to violate the individual interests (harms or loss of certain rights) of the victim and ruin the relationship between them.⁷²

Fourth, forgiveness or reconciliation contained in the victim's act of withdrawing the complaint, it reflects the restorative value and meaning of the function of criminal law as the *ultimum remedium*. Because, if the victim thought to let go of the harms or losses caused from the offence there is no need to use the means of criminal law, the complaint can be withdrawn as a concrete implementation of another name for the principle of subsidiarity,⁷³ and it's represented the objectives and the value of restorative justice, including support to the victim, put right the wrong, peacebuilding, rebuild harmony and balance without violence, etc.⁷⁴

Based on the explanations above, the concept of complaints seems closer to the protection of individual interests than the protection of the public (public) interest and also closer to the values of the restorative justice system than the retributive justice system. And what to pay attention to in the September 2019 Bill of Criminal Code is that there are several variations of an individual or public interests that are considered urgent and formulated as complaint offences, including,⁷⁵ *first*, the type of single interest, in common is kind of interest in honor, such criminal offence of insulting state institutions,⁷⁶ slander,⁷⁷ minor insults,⁷⁸ complaints of slander,⁷⁹ defamation of the dead,⁸⁰ fleeing a woman.⁸¹ *Second*, the type of dual interest; which is a combination of property rights and honor can

⁷² Zehr, *Changing Lenses : A New Focus for Crime and Justice Christian Peace Shelf Selection* (n 6) 81-82, 181-184; Pali (n 3) 155-156; Muladi (n 17) 125-129.

⁷³ See the explanation of Bill of Criminal Code in 2015 the Indonesian Parlement and the ministry of law and human Right, Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP) Draf 2015 dan Rancangan Penjelasannya 2015 178, 223-224. Rusydianta (n 52) 323, 501; Nurbaningsih and All (n 55).

⁷⁴ United Nations Office on Drugs and Crime (n 4) 9-11; United Nations Office on Drugs and Crime (n 5) 6-8, 14; Zehr and Gohar (n 3) 22, 31; Zehr, *The Little Book of Restorative Justice* (n 6) 44-45; Pali (n 3) 155.

⁷⁵ See the explanation of Bill of Criminal Code in 2019 the Indonesian Parlement and the ministry of law and human Right Rancangan Undang-Undang Kitab Undang-Undang Hukum Pidana (RUU KUHP) Draf September 2019 (n 48) 244.

⁷⁶ Bill of Criminal Code 2019, art. 353.

⁷⁷ *ibid*, art. 440.

⁷⁸ *ibid*, art. 442.

⁷⁹ *ibid*, art. 443.

⁸⁰ *ibid*, art. 445.

⁸¹ *ibid*, art. 460 (2) and (4).

be found in the formulation of the following criminal acts: counterfeiting of marks,⁸² the crime of theft in the family,⁸³ living together outside of marriage,⁸⁴ threats,⁸⁵ disclosure of company secrets.⁸⁶

Based on explanation above, although *klachtdelict* or complaint has a part of restorative justice values in the formulation articles. What should be underlined from the description above is that the crime of fraud as regulated in Chapter XXVII has not been formulated as the complaint (*klachtdelict*) category, even in its minor crime of fraud (mild type of fraud Article 500 of the September 2019 Bill of Criminal Code).

E. Conclusion

The researcher concludes that the restorative formulation of crime of fraud in Article 378 of the Criminal Code can be done through a reorientation of the assumptions regarding the crime in the formulation of the article based on the values approach and policy approach, namely by embodying various basic assumptions, concepts, and values of restorative justice in the formulation of Article 378 of the Criminal Code in the future. And the reorientation of the concept of restorative justice in the context of criminal policy from the crime of fraud in Article 378 of the Criminal Code can be done in several ways: 1) either by formulating a crime of fraud (Article 378) as part of pure civil law through a decriminalization policy; or 2) formulating a crime of fraud (Article 378) as a complaint offence (*klachtdelict*) which is recognize a) harms and needs of the victims and offenders, b) expanding the meaning of victims, c) dialogue, d) relationship in human nature, etc; or 3) juxtaposing the penal policy with a restorative pattern in the formulation of a criminal act that is still in a retributive – repressive format as is done in the September 2019 Bill of Criminal Code (Article 498). And because restorative values are every action or formulation that is considered correct (the right thing) from the restorative justice perspective and paradigm. All of the above cannot be done unless it begins with changing perspectives and assumptions regarding crime of fraud from the lenses of restorative justice, so then the restorative value is easily embodied in the related article (Article 378) like water inflowing river.

⁸² *ibid*, art. 394.

⁸³ *ibid*, art. 487.

⁸⁴ *ibid*, art. 418.

⁸⁵ *ibid*, art. 489.

⁸⁶ *ibid*, art. 450.

The researcher suggests the need for reformulation of the related article, either by reformulating and enacting it as a complaint offence (klachtdelict) especially in the September 2019 Bill of Criminal Code) as the next Criminal Code; or at least by enacting the Bill of Criminal Code (Article 498 of the September 2019 Bill of Criminal Code include) so that some of the restorative values from penal policy contained in such as pardon and compensation or social services (social work) can be applied in its penal formulation. Because those penal policies recognize the harms and needs of the offender and the victims, unity in their relationship, deliberations - dialogue in their process, and forgiveness - peacemaking in their decisions as part of restorative justice value of Indonesian people on Pancasila. But at least there is still a need for comprehensive analysis and discussion related to the restorative reformulation to another article, especially which is different types from crime of fraud. Because the research is only specifically formulated the value of restorative justice in the context of crime of fraud.

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